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Reply Brief 1976-SC-0403

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KYSC1976-SC-0403-03

{00113332-6A83-4EC0-94EA-C26CCA1F0818}

{135147}{54-130809:112933}{071476}

REPLY BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-403

**OWENSBORO METROPOLITAN
PLANNING COMMISSION,**
consisting of Dr. Albert Joslin,
Robert Hoskins, Holloway Hawes,
Wilbur "Buzz" Norris, Jolly Hayden
Lee K. Nelson, Billy Joe Miles,
Robert Riggs, Willis P. Brooks and
Jarred Barron, in their official
capacity as members thereof **APPELLANT**

v.

O. H. SNYDER AND HELEN C. SNYDER,
his wife, d/b/a **OWENSBORO HOMES,**
a partnership **APPELLEES**

REPLY BRIEF FOR APPELLANT

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JUL 14 1976

**KIMA LAYNE COLLINS
CLERK
SUPREME COURT**

This is to certify that copies of the within brief were served by First Class Mail upon
opposing counsel, Hon. Ronald M. Sullivan, Hon. Philip B. Hayden, and the Trial Judge,
Hon. Robert M. Short, as required by R. A. P. 1.250, this 13th day of July, 1976.


Attorney for Appellant
Owensboro Metropolitan Planning Commission

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
PURPOSE OF THE BRIEF	1, 2
QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED	2
ARGUMENT	3
I. ASSUMING ARGUENDO THAT SNYDER OFFERED UNCONTRADICTED EVIDENCE, HIS EVIDENCE IS NOT BINDING ON THE TRIER OF FACT, DAVIESS FISCAL COURT	3
<i>City of Louisville v. McDonald</i> , Ky., 470 S. W. 2d 173	3
<i>Bullock v. Gay</i> , 296 Ky., 489 177, S. W. 2d 883 at 885	4
<i>Keller v. Morehead</i> , Ky., 247, S. W. 2d 218 .	4
<i>City of Bowling Green, v. Hunt</i> , Ky., 516 S. W. 2d 647	4
II. THE SNYDERS HAVE NOT MET ANY OF THE REQUIREMENTS OF KRS 100.213	5
<i>Ward v. Knippenberg</i> , Ky., 416 S. W. 2d 746	5, 6
KRS 100.213 (2)	6
KRS 100.213	6

III. THE REFUSAL TO GRANT THE SNYDERS' REZONING REQUEST WAS BASED ON SUBSTANTIAL AND LEGALLY SUFFICIENT REASONS	6
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<i>City of Bowling Green v. Hung</i> , Ky., 516 S. W. 2d 647	7
<i>Taylor v. Coblin</i> , Ky., 461, S. W. 2d 78	7

CONCLUSION	8
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REPLY BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

PURPOSE OF THE BRIEF

The Appellant, Owensboro Metropolitan Planning Commission (hereinafter referred to as OMPC) is compelled to correct the misstatements of the facts and the law contained in the Appellees'

(hereinafter referred to as Snyders) brief.

One of the reasons for the rejection of the Snyders' rezoning request was the traffic safety problem which exists on Veatch Road. The Snyders blandly state that the Veatch Road is "a 60 foot wide county road." (Snyders' brief, page 4). In fact, according to the testimony of O. H. Snyder, the road surface is but 18 feet wide and includes a narrow bridge. (Daviness Fiscal Court Transcript of Evidence 53).

The Snyders state that classification of their land as R-3 would agree with the Comprehensive Plan. (Snyders' brief, page 27). This is utterly false, since the plan shows the area as low density residential and R-3 is high density residential. This matter is treated in greater detail in Argument II.

QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

I. Assuming arguendo that Snyder offered uncontradicted evidence, is his evidence binding on the trier of fact, Daviness Fiscal Court?

II. Have the Snyders met any of the requirements of KRS 100.213?

III. Was the refusal to grant the Snyders' rezoning request based upon substantial and legally sufficient reasons?

ARGUMENT

I. ASSUMING ARGUENDO THAT SNYDER OFFERED UNCONTRADICTED EVIDENCE, HIS EVIDENCE IS NOT BINDING ON THE TRIER OF FACT, DAVIESS FISCAL COURT.

Daviess Fiscal Court sat as a quasi-judicial body in hearing the Snyders' request for a rezoning of their property. *City of Louisville v. McDonald*, Ky., 470 S. W. 2d 173. As the trier of fact, Daviess Fiscal Court was not bound by O. H. Snyder's "uncontradicted" evidence for two reasons: 1) evidence or testimony given by a party or interested witness is not binding upon the trier of fact, 2) opinion evidence, even though uncontradicted, is not binding upon the trier of fact.

It has long been recognized that the testimony of someone interested in the outcome of litigation must be taken with a grain of salt. The Kentucky Court of Appeals has enunciated this principle as follows:

It does not necessarily follow, however, that a verdict or finding must be made in favor of the party introducing uncontradicted testimony, especially if such testimony discloses a variety of circumstances from which different minds may reasonably arrive at different conclusions

as to the ultimate facts or if the uncontradicted evidence is that of interested witnesses." *Bullock v. Gay*, 296 Ky., 489, 177, S. W. 2d 883 at 885.

It is also well accepted that uncontradicted opinion evidence is not binding on a trier of fact. This is particularly true where the testimony is used to establish value, as Snyder has attempted to do in this case. In *Keller v. Morehead*, Ky., 247 S. W. 2d 218, the Court of Appeals held that uncontradicted testimony as to the damage to an automobile was not binding on the trier of fact. The Court stated at page 220:

"There seems to be a basis for a distinction, as regards the binding or conclusive effect of uncontradicted testimony, between Opinion evidence and testimony as to 'facts.' Opinion testimony, even though uncontradicted, seems not to be binding upon the jury."

Therefore, the Snyders have grossly misstated the law as to the weight to be given the testimony and studies of O. H. Snyder. The validity of this evidence was for the Daviess Fiscal Court, as the trier of fact, and the Circuit Court was without authority to disturb the decision of the legislative body on the record presented. *City of Bowling Green v. Hunt*, Ky., 516 S. W. 2d 647.

II. THE SNYDERS HAVE NOT MET ANY OF THE REQUIREMENTS OF KRS 100.213.

The Snyders have used specious reasoning to show that they have met each of the criteria under KRS 100.213 for a change in the zoning classification of their land.

The Snyders state that they are entitled to an R-3 (high density residential) classification because the Comprehensive Plan shows their land to ~~live~~ in an area designated low density residential. They compound this non sequitur by pointing out that under KRS 100.213 the A-1 classification of their land was inappropriate and should, therefore, be changed to R-3. The OMPC had agreed to change the classification to R-1 (low density residential), in conformity with the Comprehensive Plan. The Snyders declined and instead sought a R-3 classification.

The zoning of the Snyders' land as A-1 (Agricultural) was not inappropriate in 1971. The land was agricultural at that time and was bordered on three sides by agricultural property. The fact that the future land use plan showed it to be eventually developed as low density residential did not mandate that this be one of the first acts of the Daviess Fiscal Court upon its assumption of the zoning function. As the Snyders have pointed out, a Comprehensive Plan is a guide, not a straight jacket. *Ward v. Knippenberg, Ky. 416 S. W. 2d*

746. Furthermore, the OMPC was willing to grant an R-1 classification upon application, and had offered to do so. (Daviness Fiscal Court, T. E. 6-7).

Appellees argue they are entitled to a rezoning of their property because there have been "major economic" changes. (Appellees Brief, p. 28). If major economic changes were alone sufficient, a sufficient decline in the Dow Jones Average might dictate that everyone was entitled to the zoning classification of his choice. This, of course, is not the case, and the Legislature has required that the changes it has delineated be found to "have substantially altered the basic character of such area." *KRS 100. 213 (2)*. The basic character of the area has not changed. In fact, the Snyders do not even allege that it has changed.

Therefore, the Snyders have, in fact, met none of the requirements of *KRS 100.213*, and the refusal of Daviness Fiscal Court to reclassify their property should be upheld.

III. THE REFUSAL TO GRANT THE SNYDERS' REZONING REQUEST WAS BASED ON SUBSTANTIAL AND LEGALLY SUFFICIENT REASONS.

The Appellees' brief flippantly refers to the reasons for the denial of their rezoning request as "emotional, unfounded and frivolous." (Appellees' Brief p. 25). The reasons are discussed in the

Appellant-OMPC brief and needn't be recounted here in detail. It is appalling that the Snyders react so callously to such problems as traffic safety and flooding when their speculated profit is in jeopardy. However, the Kentucky Court of Appeals has not found such problems to be insignificant. *City of Bowling Green, v. Hunt, Ky.* 516 S. W. 2d 647.

The Snyders argue that *Taylor v. Coblin, Ky.*, 461 S. W. 2d 78 is controlling here. The OMPC submits that Taylor is distinguishable. In Taylor, the character of the area in which the landowners' property lies had undergone a substantial change. Twenty new business establishments had come into existence in the proximate area within 16 years. *Taylor, supra*, at 79. Furthermore, the Court found no evidence that there would be "any" benefit to the public as a whole from the refusal to reclassify the property. *Id.*, at 81.

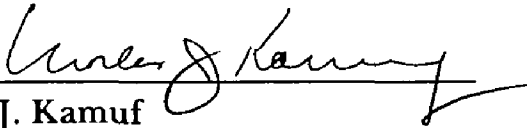
There has been no substantial change in the character of the area in which the Snyders' land is situated. The public as a whole would benefit from the prevention of the problems an unrestricted R-3 classification will create. Most notable among these are flooding and traffic safety.

The Snyders should not be allowed to be obfuscate the substantial evidence in the record by dubbing it "emotional, unfounded and frivolous." The evidence is substantial and refutes any notion that there is a compelling need to grant a zoning change.

CONCLUSION

The Appellant, OMPC, respectfully requests that the Judgement of the Daviess Circuit Court be reversed and that the denial of the rezoning request of the Snyders by the Daviess Fiscal Court be upheld.

Respectfully submitted,



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